

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be modified. The Board finds respondent should receive credit for overpayment of the temporary total disability. The Board concludes respondent's request for attorney fees and charges by their expert witness should be denied.

### **Findings of Fact**

1. Claimant injured his right knee and low back on November 18, 1993, while helping lay drainage pipe. Respondent referred claimant for medical treatment. Claimant saw Dr. Zeller, Dr. Gilbert, and eventually Dr. C. Reiff Brown. By August 8, 1994, Dr. Brown felt claimant had reached maximum medical improvement and he assigned claimant permanent restrictions. He recommended claimant limit lifting to 75 to 100 pounds occasionally, 40 to 50 pounds frequently, and that claimant do all lifting with good body mechanics. Dr. Brown also rated claimant's impairment as 6 percent of the body as a whole.
2. Mr. Gale Louk, owner and general manager of Western Irrigation, testified that he was prepared to provide accommodated work for claimant after the release by Dr. Brown. But respondent did not contact claimant and claimant did not contact respondent. Respondent continued to pay temporary total disability benefits after claimant had been released by Dr. Brown.
3. After the release by Dr. Brown, claimant continued to experience pain and requested permission to see another physician. Respondent's insurance carrier authorized a single examination by Dr. Stephen Ozanne. After seeing Dr. Ozanne, claimant obtained an order, from a July 18, 1995 preliminary hearing, authorizing Dr. Ozanne as the treating physician.
4. Claimant testified he was not able to work between the time he saw Dr. Brown and the time he saw Dr. Ozanne.
5. Claimant returned to work for a brief period between March and May 1994. He has not worked for respondent since.
6. Dr. Ozanne, by letter dated August 28, 1995, stated that claimant had been temporarily totally disabled since his first appointment with Dr. Ozanne on March 31, 1995, and that the temporary total disability probably predated that time.
7. Dr. Brown saw claimant on November 28, 1995, at the request of the Administrative Law Judge. Dr. Brown found claimant's condition to be the same as at the time he released claimant. He concluded the rating and the appropriate restrictions remained the same. In his opinion, claimant could have worked light duty work from the date of his rating and restrictions in August 1994 to the time claimant saw Dr. Ozanne in March 1995.

8. The period of temporary total disability in dispute on appeal is the period from August 8, 1994, to March 7, 1995, a period of 30 weeks which respondent paid at the rate of \$280.15 per week for a total of \$8,404.50. Respondent contends the record does not establish that claimant was temporarily totally disabled during this period.

9. Based on the opinion of Dr. Brown, the Board concludes claimant was not temporarily totally disabled for the 30 weeks from August 8, 1994, to March 7, 1995.

10. In addition to the overpayment of temporary total disability, respondent argues for credit on the award for \$500 in attorney fees which respondent contends were incurred to prepare for a deposition that claimant's counsel did not attend and had to be rescheduled. Respondent also asks for \$580.10 in charges by respondent's expert witness, Ms. Karen C. Terrill, for two appointments which claimant failed to keep.

### **Conclusions of Law**

1. Respondent is entitled to a credit for overpayment of temporary total disability. The credit is for 30 weeks paid at \$280.15 per week in the total amount of \$8,404.50. K.S.A. 44-525(b).

2. The Award provides for payment of 110.14 weeks of temporary total disability. This overstates the amount of temporary total disability by an additional 10 weeks which is apparently due to the fact the ALJ did not account for the weeks claimant worked in March, April, and May 1994. Respondent paid a total of 100.14 weeks and claimant did not request more. The only dispute related to the 30 weeks which the Board has here found were not owed. The Award should, therefore, be for a total of 70.14 weeks of temporary total disability and an 8 percent permanent partial disability.

3. Respondent's request for attorney fees and request for payment of charges by its expert witness are denied.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge William F. Morrissey on November 9, 1998, should be, and is hereby, modified.

**WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Juan Martinez, and against the respondent, Western Irrigation, and its insurance carrier, Federated Insurance Company, for an accidental injury which occurred November 18, 1993, and based upon an average weekly wage of \$447.52, for 70.14 weeks of temporary total disability compensation at the rate of \$298.36 per week or \$20,926.97, followed by 28.79

weeks at the rate of \$298.36 per week or \$8,589.78, for an 8% permanent partial disability, making a total award of \$29,516.75, all presently due and owing less amounts, including previous overpayment of temporary total disability benefits, previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 1999.

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BOARD MEMBER

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BOARD MEMBER

c: Robert A. Levy, Garden City, KS  
D. Shane Bangerter, Dodge City, KS  
William F. Morrissey, Special Administrative Law Judge  
Philip S. Harness, Director